United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1124 Original

To be argued by
DAVID R. SPIEGEL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES EX REL. ALEJANDEO DANEFF,

Petitioner-Appellant,

-against-

74-1124

ROBERT HENDERSON, Superintendent,
Auburn Correctional Facility, Auburn,
New York,

Respondent-Appellee.

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MEMORANDUM OF LAW ON BEHALF OF RESPONDENT-APPELLEE

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MEMORANDUM OF LAW ON BEHALF OF
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Questions Presented

1. Whether by knowingly and voluntarily pleading guilty to possession of a dangerous drug, pursuant to the statutes at issue herein, appellant has waived the right to make his present claim?

2. Whether, in any event, Daneff has standing to present his statutory claims?

3. Whether the statutory provisions at issue herein have a rational basis in law and in fact?

4. Whether appellant's sentence violates the Eighth Amendment's proscription against cruel and unusual punishment?

Statement

In this habeas corpus proceeding, the petitioner-appellant, Alejandeo Daneff, contends, in essence, that § 220.23 and related provisions of the New York Penal Law, pursuant to which he was convicted for possession of eighteen ounces of narcotics in 1970,* violated his constitutional rights under the Equal Protection Clause of the Fourteenth Amendment. The basis for this claims is his assertion that by determining degrees of criminality according to the quantity of the seized narcotic mixture or compound rather than the quantity of pure narcotics contained therein, these provisions employed a standard which was invidiously discriminatory. Daniff also asserts that the length of his sentence imposed pursuant to the above-named provisions constitutes cruel and unusual punishment.

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* Section 220.23 (originally misnumbered § 220.33) and the related sections involved herein, §§ 220.22 and 220.20, were repealed effective September 1, 1973 and replaced by entirely new narcotics possession provisions. The counterparts in the new law are roughly §§ 220.21 (replacing 220.23), 220.18 (replacing 220.22), and 220.09 (replacing 220.20). However, since this proceeding involves a 1970 conviction, any reference to the new provisions by appellant, either express or implied (e.g., Applt's Br., pp. 20, ff.), is plainly irrelevant.

Appellant's claims were denied in a memorandum opinion of the United States District Court for the Southern District of New York, dated October 9, 1973 (Wyatt, J.). A certificate of probable cause was granted by the District Court on November 19, 1973.

Facts

Appellant, a former Argentine businessman, was sentenced to an indeterminate prison term with a ten year maximum pursuant to his plea of guilty in Bronx County Supreme Court on September 22, 1970 to the crime of criminal possession of a dangerous drug in the second degree. He was paroled on December 28, 1973 from Auburn Correctional Facility.

The facts pertinent to his plea and sentence can be summarized as follows:

On January 23, 1970, while visting the United States on a business trip, appellant was arrested by two detectives assigned to the Narcotics Division of the New York City Police Department. The detectives, acting pursuant to a search warrant, had stopped Daneff on a Bronx street and discovered under his coat two plastic bags containing a cocaine compound weighing an aggregate of eighteen ounces. In addition, the officers found $5,000 in cash.

On February 9, 1970, the Grand Jury of Bronx County indicted Daneff, charging him with the crime of Criminal Possession of a Dangerous Drug in the First Degree, a class A felony (Penal Law, § 220.33, thereafter renumbered § 220.23). In a demurrer filed on April 20, 1970, appellant challenged the indictment on the same grounds herein alleged. However, after argument was heard on April 29, 1970, the demurrer was disallowed.

On September 22, 1970, through his present counsel, who has represented him from the inception of this case, Daneff pleaded guilty in Bronx County Supreme Court (Dollinger, J.) to the crime of Criminal Possession of a Dangerous Drug in the Second Degree, a class B felony. Appellant acknowledged that he had discussed the case with his attorney, that he was cognizant of the statutory provision to which he was pleading guilty, and that he nonetheless, of his own free will, wanted to enter his plea (Plea Minutes, 4; the Plea Minutes, which are included herein as a supplemental record are hereafter cited as PM, followed by the appropriate page number; the sentencing minutes, which are also included herein as a supplemental record, will be cited infra as SM, followed by the appropriate page number). When the court questioned him as to the facts of the crime, Daneff admitted possessing a narcotic drug consisting of a sixteen ounce

cocaine mixture (PM, 5). The court then informed appellant that he would be treated as a class C felony offender and that a term of imprisonment of up to ten years would be imposed on the day of sentence (PM, 5).

On December 18, 1970 Daneff was brought before the Bronx County Supreme Court for sentencing. Appellant again moved for an arrest of judgment on the same grounds advanced herein and again his claims were rejected. (SM, 3-10). Daneff then stated there was no legal cause why sentence should not be imposed upon him, and he was sentenced to an indeterminate term in State Prison not to exceed ten years (SM, 21).

Prior Proceedings

A. State

Appellant's present claims have already been raised exhaustively and at considerable length in the state courts by his present counsel on direct appeal from his conviction. The Appellate Division, First Department unanimously affirmed the conviction without opinion on October 28, 1971 (People v. Daneff, 37 A D 2d 117); subsequently, the Court of Appeals granted leave to appeal but then affirmed, also without opinion, on June 1, 1972 (30 N Y 2d 793); finally, on January 22, 1970, the United States Supreme Court denied a writ of certiorari.

B. Federal

On May 9, 1973, appellant instituted this proceeding in the United States District Court for the Southern District of New York (Wyatt, J.). His application for a writ of habeas corpus was denied in a memorandum opinion dated October 9, 1973.

At the outset of his opinion, Judge Wyatt said that there was "grave doubt that Daneff has any standing to raise [his] claim" (Op., p. 3). The Court reasoned as follows:

> "In connection with his demurrer in the state court and with the later proceedings, Daneff made no attempt to show what percentage of pure cocaine was in the one pound two ounces of 'light [white] powder in his possession' ...
>
> "For all that appears, therefore, the mixture Daneff had could have been 95% cocaine, or 1% ... As applied to Daneff, these laws may have favored him over others. The situation is entirely hypothethical and speculative as to him." (Op., p. 3)

In any event, reaching the merits of Daneff's claim, the court concluded that the classifications employed by the challenged state statutes had to be upheld because they were "reasonably related to the legitimate objective of

the control of the distribution and use of narcotics" (Op., p. 4). The rationale for classifying penalty according to the weight of the narcotic mixture rather than the pure narcotic content was "undoubtedly" that:

> "narcotic drugs are never sold - or even imported - as such, that is, in a pure form. They are sold after being diluted with milk sugar, quinine, mannitol, and other dilutents...
>
> "Since narcotics are thus sold and used in a diluted form, it seems reasonable for the legislature to distinguish on the weight of the market product rather than weight of the narcotic content of the market product. The quantity of the market product processed seems a reliable guide to whether a defendant is a large scale or a small scale seller." (Op., p. 4)

The Court also noted that Daneff's secondary claim that his sentence subjected him to cruel and unusual punishment in violation of the Eighth Amendment was "without merit" (Op., p. 5). Judge Wyatt observed:

> "An indeterminate sentence of up to a maximum of ten years was imposed. The sentence given was well within the limits of the statute and did not constitute an abuse of discretion on the part of the sentencing judge." (Op., p. 5).

Statutes Involved

§ 220.23 Criminal possession of a dangerous drug in the first degree

"A person is guilty of criminal possession of a dangerous drug in the first degree when he knowingly and unlawfully possesses a narcotic drug consisting of one or more preparations, compounds, mixtures or substances of an aggregate weight of sixteen ounces or more containing any of the respective alkaloids of salts of heroin, morphine or cocaine, or containing raw or prepared opium.

"Criminal possession of a dangerous drug in the first degree is a class A felony."

§ 220.22 Criminal possession of a dangerous drug in the second degree

"A person is guilty of criminal possession of a dangerous drug in the second degree when he knowingly and unlawfully possesses a narcotic drug consisting of one or more preparations, compounds, mixtures or substances of an aggregate weight of eight ounces or more, containing any of the respective alkaloids or salts of heroin, morphine or cocaine, or containing raw or prepared opium.

"Criminal possession of a dangerous drug in the second degree is a class B felony."

§ 220.20 Criminal possession of a dangerous drug in the third degree

"A person is guilty of criminal possession of a dangerous drug in the third degree when he knowingly and unlawfully possesses a narcotic drug consisting of (a) one hundred or more cigarettes containing cannabis; or (b) one or more preparations, compounds, mixtures or substances of an aggregate weight of (i) one or more ounces, containing any of the respective alkaloids or salts or heroin, morphine or cocaine, or (ii) one or more ounces, containing any cannabis, or (iii) two or more ounces, containing raw or prepared opium, or (iv) two or more ounces, containing one or more than one of any of the other narcotic drugs.

"Criminal possession of a dangerous drug in the third degree is a class C felony."

POINT I

BY KNOWINGLY AND VOLUNTARILY PLEADING GUILTY TO POSSESSION OF A DANGEROUS DRUG, APPELLANT HAS WAIVED THE RIGHT TO MAKE HIS PRESENT CLAIM.

The central and inescapable reality in this proceeding is the fact that appellant's incarceration follows a knowing and voluntary plea of guilty to the crime of criminal possession of a dangerous drug in the second degree. This is apparent from the plea minutes and is implicitly conceded in his papers (Applt's Br., pp. 5, 8). By so doing, Daneff has clearly waived his right to make any claim as to the constitutional validity of the statutes under which he was convicted. McMann v. Richardson, 397 U.S. 759 (1970).

It is well established law that a guilty plea is an act of far-ranging significance that thereafter bars a criminal defendant from "rais(ing) independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea", Tollett v. Henderson, 411 U.S. 258, 267 (1973) (waives right to allege exclusion of negroes from grand jury); also Brady v. United States, 397 U.S. 742 (1970) (waives right to claim plea was motivated by fear of penalty that might otherwise be imposed); McMann v. Richardson, supra, 397 U.S. at 768-771 (waives right to claim plea was motivated by allegedly coerced confession). In this circuit a guilty plea has been generally characterized as "a waiver of all non-jurisdictional defects in any prior stage of the proceedings", U.S. ex rel. Glenn v. McMann, 349 F. 2d 1018, 1019 (2d Cir. 1965); also, U.S. ex rel. DeFlumer v. Mancusi, 380 F. 2d 1018 (2d Cir. 1967).* The

* Although this court has held that the waiver rule does not apply to every possible prior to plea non-jurisdictional defect, United States ex rel. Rogers v. Warden, 381 F. 2d 209 (2d Cir. 1967); U.S. ex rel. B v. Shelly, 430 F. 2d 215 (2d Cir. 1970) [pre-plea suppression motions], it has noted, significantly:

> "...waiver is presumed because ordinarily such a plea [guilty plea] is an indication by the defendant that he has deliberately failed or refused to raise his claims by available state procedure." (Rogers, at 213, emphasis added)

Rogers dealt with a pre-plea motion to suppress evidence alleged to be the fruit of an illegal search and seizure -- a situation which was specifically recognized under New York State law as an exception to the general rule regarding guilty pleas. (Rogers at 214). Here, of course, the

Footnote Continued:

situation is different; indeed, here appellant's plea constituted a deliberate waiver of his present claims (see infra). It also should be noted that the Rogers holding has been implicitly limited by the decisions of the United States Supreme Court in Brady and later cases (for names and citations see supra).

rationale behind this stringent rule has been described as follows (Brady, 397 U.S. at 748):

> "He (the defendant) ... stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so ... The plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial -- a waiver of his right to trial before a jury or judge."

Here, it is clear that Daneff's willingness to abandon his Fifth Amendment "Shield", as expressed in his statements at the time he entered his guilty plea and his subsequent conduct at sentencing, bar his present claims.

At the time of his plea Daneff conceded that he had discussed the case with this attorney and he was voluntarily pleading guilty to Criminal Possession of a dangerous drug in the Second Degree. He then admitted that he had had possession of sixteen ounces of a narcotic compound containing the alkaloid or salts of cocaine (SM, 5). These admissions go to the very heart of the language of the Penal Law provisions Daneff now challenges, and it is obviously paradoxical for Daneff to contend that they do not. Indeed, what is even more incredible about Daneff's present claim is that he

raised it unsuccessfully five months prior to the time of his guilty plea (see supra, p. 4) and therefore must be construed as having deliberately waived it through his plea. Cf. Brady and McMann cases cited supra pp. 9-10. At the time of Daneff's sentencing the claim was again made through a motion for arrest of judgment, and when the court denied the motion (SM, 3-10), Daneff indicated there was no legal cause why sentence should not be imposed on him.

Plainly, if it was appellant's intent to contend, as he now does, that the narcotic content of his mixture was so insubstantial as to result in an unconstitutional application of the Criminal Procedure Law to his case, he had no business pleading guilty. The fact that he did plead guilty, definitely bars his present claim. See Tollett and Brady cases, cited supra, pp. 9-10.

POINT II

IN ANY EVENT, SINCE DANEFF'S ALLEGATIONS ARE BASED ON SPECULATION RATHER THAN HARD FACTUAL EVIDENCE, HE LACKS THE STANDING TO PRESENT THEM.

At the heart of this proceeding is appellant's equal protection claim that, pursuant to the challenged provisions of the Criminal Procedure Law, he was subjected to a greater potential sentence that those persons having a

narcotic mixture with a lower weight but a higher narcotic content. Obviously, the viability of such a claim depends on evidence as to the actual narcotic content of the mixture that was in Daneff's possession at the time of his arrest. But it is precisely this evidence which is lacking herein.

At the time of Daneff's arrest no quantitative analysis was ever performed of the mixture found in his possession. Appellant's subsequent guilty plea eliminated the need for such an analysis. Thus, in the words of the lower court, "For all that appears ... the mixture Daneff had could have been 95% cocaine, or 1%" (Op., p. 3).

Predictably, Daneff seeks to create the impression that it is the latter figure which applies to him (Applt's Br., pp. 13, ff.). But appellant's position has an unwarranted air of opportunism: having obviated the need for a pretrial analysis of his mixture by pleading guilty, Daneff seeks to speculate on the evidentiary void that was largely a result of his own doing. Obviously, if appellant did indeed possess a mixture with an infinitesimal amount of pure narcotics, he had no business voluntarily pleading guilty.

Since it is questionable whether appellant has sustained an injury under the statutes at issue here, the lower court quite properly noted there is a "grave doubt" as to his standing to present the claims herein. Cf. Data Processing Service v. Camp, 397 U.S. 150, 151 (1970); Flast v. Cohen, 392 U.S. 83, 91-101 (1968). In any event, any question as to the precise extent of the injury sustained by Daneff must inevitably rest on pure speculation.

POINT III

APPELLANT'S EQUAL PROTECTION CLAIMS ARE CLEARLY WITHOUT MERIT; THE CHALLENGED STATUTORY PROVISIONS HEREIN HAVE AN ENTIRELY RATIONAL BASIS IN LAW AND IN FACT.

In the final analysis, even assuming appellant's equal protection claims are properly before this court, it is clear that the state's classifications regarding narcotics use have an entirely proper basis and therefore cannot be constitutionally impugned.

As the lower court has already indicated (Op., p. 4), the basic inquiry here is "whether the challenged distinction rationally furthers some legitimate, articulated state purpose", McGinnis v. Royster, 410 U.S. 263, 276 (1973). This

"rational basis" test [viz., Dandridge v. Williams, 397 U.S. 471 (1970)] must be applied in place of the more stringent "searching judicial scrutiny" standard [viz., San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 6 (1973)] because it is undisputably clear that classifications which merely determine degrees of penalty, among narcotics users plainly do not involve any fundamental constitutional right [viz. Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote)] or "suspect" classifications [viz., Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (poll tax)]. Indeed, "it is enough that the State's action be rationally based and free from invidious discrimination", Dandridge, supra, 397 U.S. at 487.

The rationale behind the weight distinctions in the penal law is plainly set forth in the Governor's memorandum on the provisions at issue herein, as cited in the 1969 New York State Legislatuve Annual at p. 560:

> "The bills quite properly distinguish between snall scale sellers of hard-core narcotics who are often themselves addicted to the drugs they sell, and large scale sellers who reap enormous weekly profits from plying their insidious trade. The severity of the increases in penalties that the bills provide is justified by the nature and quantity of the drugs involved."

Although there is, unfortunately, no explicit statement as to the reason for making penalty dependent upon the weight of the mixture rather than its pure narcotic content, it is not hard to infer from the above what this reason is.

It is common knowledge that the narcotics mixtures found in the illicit, street market are in a diluted form and vary greatly as to the actual amount of pure narcotic present. Indeed, these realities are freely conceded by appellant himself (Applt's Br., p. 8). Since it is this diluted product which is sold to the addict and inasmuch as there is no definite percentage of narcotics present in any mixture sold on the streets, it is not at all surprising that the Legislature concerned itself with possession of the marketable compound rather than the percentage of narcotics contained therein. Such an approach involves a realistic appraisal of the nature of the "insidious trade" referred to in the Governor's Memorandum, supra: that it is the mixture itself rather than the "purity" of the narcotic ingredient(s) which has a direct relationship to the volume of street traffic in illegal drugs. Op. Below, p. 4; contrast, Applt's Br., p. 15.

Petitioner apparently chooses to controvert the rationality of the Criminal Procedure Law scheme at issue here by concentrating on the exceptional, "for instance" case -- the situation where the seized narcotic mixture contains only an infinitesimal degree of pure narcotics. However, as we have already noted in Point II, supra, there is simply no proof here that the seized narcotic mixture did contain a minute amount of narcotics. Indeed, in view of the fact that appellant entered his guilty plea after the arguments now set forth in this proceeding were advanced in the trial court, an inference clearly can be made that Daneff's mixture contained more than an infinitesimal amount.

Even assuming that the actual amount of pure narcotics involved herein was only a "trace", it is clear that this would have been a valid basis for conviction. As this court noted in United States v. Haynes, 398 F. 2d 980 (2d Cir. 1968) at 987:

> "... it is not necessary for the prosecution to offer evidence of the quantity of heroin involved in the substance sold. It is enough that there be sufficient evidence ... that the substance involved did, in fact, contain heroin."

See also, United States v. Curbelo, 423 F. 2d 1204 (5th Cir. 1970); United States v. Wanton, 380 F. 2d 792 (2d Cir. 1967). The rationale of these decisions is that even when a heroin compound is diluted to 1% strength, it can be and is effectively used by addicts [cf., State v. Martinez, 485 P. 2d 600 (Ariz. Ct. of App. 1971)].

Finally, it should be noted that appellant's parade of horror cases that could occur under the provisions at issue here -- including the example of 7-1/2 grams of pure heroin thrown into a pail of garbage (Applt's Br., p. 10) -- have never in fact occurred in New York State. Significantly, Daneff's one actual case example of alleged statutory abuse is a trivial and inconclusive one: it involves a Queens County Criminal Court defendant charged with a class C felony for possessing two bottles of methadone (Applt's Br., p. 13). The outcome of the case is not indicated.

Needless to say, respondent does not contend that the statutory scheme at issue here is perfect. However, as the Supreme Court noted in Oregon v. Mitchell, 400 U.S. 112 (1970) at 127:

> "The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection."

Also, Dandridge, 397 U.S. at 485-486 cited supra; McDonald v. Board of Elections, 394 U.S. 802, 809 (1969); McGowan v. Maryland, 366 U.S. 420, 426 (1961). The relevant point for the purpose of the present proceeding is that the penal law statutes have a clearly reasonable basis. McGinnis, 410 U.S. at 276, cited supra; United States v. Rodriguez-Comacho, 468 F. 2d 1220, 1221 (2d Cir. 1972). Petitioner cannot ask this court to implement his own ideas in place of statutory provisions with an obviously meaningful rationale in law and in fact. Baldwin v. Smith, 446 F. 2d 1043, 1045 (2d Cir. 1971); United States v. Wiesner, 216 F. 2d 739 (2d Cir. 1954).

POINT IV

APPELLANT'S SENTENCE DOES NOT VIOLATE THE EIGHTH AMENDMENT PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

Appellant's Eighth Amendment claim is premised on an assertion that his possession of eighteen ounces of narcotics could have subjected him to life imprisonment (Applt's Br., p. 20). However, this claim is plainly without merit.

The short answer to Daneff's argument is that it is baldly contradicted by factual reality. The life imprisonment figure that he casually sets forth in his brief merely represents a sentencing maximum under his indictment. See Penal Law § 70.00, subds 2(a) and (3)(a), as effective in 1970. In fact, as we have already noted (supra, p. 3), Daneff was sentenced to an indeterminate prison term with a ten year maximum. He was paroled on December 28, 1973.

Appellant's reliance on the case of Furman v. Georgia, 408 U.S. 238 (1972), is plainly misplaced. The Eighth Amendment claim of the plaintiffs in Furman, in contrast to the present situation, involved the death penalty. Moreover, it is instructive to note that three of the five justices who wrote the per curiam opinion in Furman specifically stated in separate, concurring opinions that they did not believe the death penalty was per se unconstitutional. Furman, 408 U.S. at 240-257 (concurring opinion of Mr. Justice Douglas), at 306-310 (concurring opinion of Mr. Justice Stewart), and at 310-314 (concurring opinion of Mr. Justice White).

Ultimately, plaintiff's Eighth Amendment claim boils down to simple quibbling about a state court judge's reasonable exercise of his lawfully vested sentencing powers. This, as the lower court has already noted (Op., p. 5), is plainly not a proper subject for a federal habeas corpus proceeding. United States ex rel. Annuziato v. Deegan, 440 F. 2d 304, 306 (2d Cir. 1971); United States v. Dawson, 400 F. 2d 194, 200 (2d Cir. 1968), cert. den. 393 U.S. 1023 (1969); Gilmore v. People of California, 364 F. 2d 916 (9th Cir. 1966).

CONCLUSION

THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING APPELLANT'S APPLICATION FOR A WRIT OF HABEAS CORPUS SHOULD IN ALL RESPECTS BE AFFIRMED.

Dated: New York, New York
April 30, 1974

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GLORIA KIRNON , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 30th day of April , 1974 , she served the annexed upon the following named person :

Abraham Werfel, Esq.
Attorney for Petitioner
160-10 ~~165-08~~ Jamaica Avenue
Jamaica, New York

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Gloria Kirnon
GLORIA KIRNON

Sworn to before me this
30th day of April , 1974

Assistant Attorney General
of the State of New York